

COURT SERVICES

ENDORSED

2012 NOV 29 2:33:31

RECEIVED  
CLERK OF COURT  
SANTA CLARA COUNTY

D. Wendel

1 Arthur A. Hartinger (SBN: 121521)  
ahartinger@meyersnave.com  
2 Linda M. Ross (SBN: 133874)  
lross@meyersnave.com  
3 Jennifer L. Nock (SBN: 160663)  
jnock@meyersnave.com  
4 Michael C. Hughes (SBN: 215694)  
mhughes@meyersnave.com  
5 MEYERS, NAVE, RIBACK, SILVER & WILSON  
555 12th Street, Suite 1500  
6 Oakland, California 94607  
Telephone: (510) 808-2000  
7 Facsimile: (510) 444-1108

8 Attorneys for Defendant  
City of San Jose  
9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 COUNTY OF SANTA CLARA

12 SAN JOSE POLICE OFFICERS'  
13 ASSOCIATION,

14 Plaintiff,

15 v.

16 CITY OF SAN JOSE, BOARD OF  
ADMINISTRATION FOR POLICE AND  
17 FIRE RETIREMENT PLAN OF CITY OF  
SAN JOSE, and DOES 1-10 inclusive.

18 Defendants,  
19  
20

21  
22 AND RELATED CROSS-COMPLAINT  
23 AND CONSOLIDATED ACTIONS  
24  
25  
26  
27  
28

Case No. 1-12-CV-225926

[Consolidated with Case Nos. 112CV225928,  
112CV226570, 112CV226574, 112CV227864].

Assigned for all purposes to the Honorable Patricia  
M. Lucas

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT CITY OF SAN JOSE'S  
MOTION FOR JUDGMENT ON THE  
PLEADINGS AS TO THE SAN JOSE POLICE  
OFFICERS' ASSOCIATION'S SEVENTH  
CAUSE OF ACTION FOR VIOLATION OF  
THE MEYERS-MILIAS-BROWN ACT.

Date: January 17, 2013

Time: 9:00 a.m.

Courtroom: 2

BY FAX

Complaint Filed: June 6, 2012

Trial Date: None Set

CASE NO. 1-12-CV-225926

MEMORANDUM OF POINTS & AUTHORITIES ISO DEFENDANT'S MOTION FOR JUDGMENT ON THE  
PLEADINGS

## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. STATEMENT OF FACTS.....	2
A. Measure B. ....	2
B. The SJPOA's Complaint. ....	3
C. The SJPOA's Application To File A <i>Quo Warranto</i> Action. ....	4
III. ARGUMENT .....	5
A. Plaintiff Cannot State A Substantive Claim Under The MMBA.....	5
1. The MMBA Does Not Contain Substantive Requirements. ....	5
2. Under The MMBA, The City's Only Obligation Before Placing Measure B On The Ballot Was Procedural – To Meet And Confer With The SJPOA. ....	6
(a) Under the California Constitution, the compensation of charter city employees is a matter of local concern. ....	7
(b) The MMBA is compatible with voter authority over city charter provisions establishing terms and conditions of employment. ....	7
(c) The requirement that changes to charter enacted wages and benefits be submitted to the voters is not inconsistent with the MMBA. ....	9
B. Plaintiff SJPOA's Seventh Cause of Action Must Be Dismissed Because A Claim For Violation Of The MMBA In Placing A Measure On The Ballot Can Be Brought Only In A <i>Quo Warranto</i> Action .....	11
C. SJPOA'S Pending Application With The Attorney General For Leave To File A <i>Quo Warranto</i> Action Admits That <i>Quo Warranto</i> Is The Sole Legal Avenue For Its MMBA Procedural Claim. ....	13
IV. CONCLUSION .....	14

## TABLE OF AUTHORITIES

		Page(s)
3	<b>CASES</b>	
4	<i>Building Material &amp; Construction Teamsters' Union v. Farrell,</i>	
5	41 Cal. 3d 651 (1986).....	1, 8, 10
6	<i>City and County of San Francisco v. Cooper,</i>	
7	13 Cal. 3d 898 (1975).....	1, 7, 10
8	<i>City and County of San Francisco v. United Assn. of Journeymen,</i>	
9	42 Cal. 3d. 810 (1986).....	8
10	<i>Cooper v. Leslie Salt Co.,</i>	
11	70 Cal. 2d 627 (1969).....	11
12	<i>County of Riverside v. Superior Court,</i>	
13	30 Cal. 4 <sup>th</sup> 278 (2003).....	6, 7
14	<i>County of Sonoma v. Superior Court,</i>	
15	173 Cal. App. 4 <sup>th</sup> 322 (2009).....	5
16	<i>International Assn. of Fire Fighters v. City of Oakland,</i>	
17	174 Cal. App. 3d 687 (1985).....	2, 11, 12
18	<i>Oakland Municipal Improvement League v. City of Oakland,</i>	
19	23 Cal. App. 3d 165 (1972).....	11
20	<i>People ex rel. Seal Beach Police Officers' Assn. v. City of Seal Beach,</i>	
21	36 Cal. 3d 591 (1984).....	passim
22	<i>Sonoma County Organization of Public Employees v. County of Sonoma,</i>	
23	23 Cal. 3d 296 (1979).....	6
24	<i>State Building and Construction Trades Council of California, AFL-CIO v. City of Vista,</i>	
25	54 Cal. 4 <sup>th</sup> 547 (2012).....	7
26	<i>Stoops v. Abbassi,</i>	
27	100 Cal. App. 4th 644 (2002).....	5
28	<i>United Public Employees v. City and County of San Francisco,</i>	
	190 Cal. App. 3d 419 (1987).....	1, 9, 10
	<i>Voters for Responsible Retirement v. Board of Supervisors of Trinity County,</i>	
	8 Cal. 4 <sup>th</sup> 765 (1994).....	9, 10

1 **STATUTES**

2	Code of Civil Procedure § 438.....	1
3	Code of Civil Procedure § 438(c) .....	5
4	Code of Civil Procedure § 438(c)(1)(B)(ii).....	5
5	Code of Civil Procedure § 438(d) .....	5
6	Code of Civil Procedure § 803 .....	11
7	Elections Code § 3751(a)(2) .....	10
8	Gov. Code § 3500.....	7
9	Gov. Code § 3500, subd. (a).....	5
10	Gov. Code §§ 3504, 3505.....	5
11	Gov. Code § 3505.1.....	5
12	Gov. Code § 3505.7.....	5
13	Gov. Code § 3512 <i>et. seq.</i> .....	3
14	Gov. Code § 25123(e) .....	9, 10
15	<b>OTHER AUTHORITIES</b>	
16	95 Ops. Cal. Atty. Gen. 31 (2012) .....	12
17	Cal. Const., art. XI, § 1(b).....	7
18	Cal. Const., art. XI, § 3(b).....	7
19	Cal. Const., art. XI, § 5(b)(4) .....	6
20	California Code of Regulations, Title 11, § 2 .....	11

1 The City of San Jose ("the City" or "San Jose") brings this motion for judgment on the  
2 pleadings pursuant to Section 438 of the Code of Civil Procedure as to the Seventh Cause of  
3 Action brought by the San Jose Police Officers' Association ("SJPOA") for violation of the  
4 Meyers-Miliias-Brown Act ("MMBA").

5 **I. INTRODUCTION**

6 On June 5, 2012, the voters of San Jose enacted Measure B, which amended the San Jose  
7 City Charter to reform employee retirement benefits, lower retirement costs and preserve essential  
8 City services. The SJPOA and others sued the City over the legality of Measure B in five separate  
9 actions, which this Court ordered consolidated for pretrial purposes. The SJPOA is the only  
10 plaintiff to bring a claim under the MMBA in these consolidated actions.

11 In its Seventh Cause of Action, the SJPOA brings both "substantive" and "procedural"  
12 claims for violation of the MMBA. The SJPOA claims that two provisions of "Measure B" –  
13 increased employee contributions to pensions and retiree health care – violate the MMBA because  
14 their presence in the City Charter may make them no longer subject to negotiation in a  
15 memorandum of understanding between the City and the union.

16 The SJPOA fails to state a claim for violation of the MMBA. The MMBA does not  
17 contain any "substantive" requirements for terms and conditions of public employment. The  
18 MMBA's requirements are purely procedural. In this instance, the SJPOA can litigate whether the  
19 City satisfied the MMBA's procedural requirements only by bringing a *quo warranto* action.

20 Under the California Constitution, charter cities have the authority to set terms and  
21 conditions of employment for city employees in their charters. The California Supreme Court has  
22 held, on numerous occasions, that this authority is compatible with the MMBA. *See, City and*  
23 *County of San Francisco v. Cooper*, 13 Cal. 3d 898 (1975); *Building Material & Construction*  
24 *Teamsters' Union v. Farrell*, 41 Cal. 3d 651 (1986); and *People ex rel. Seal Beach Police*  
25 *Officers' Assn. v. City of Seal Beach*, 36 Cal. 3d 591 (1984).

26 Under *Seal Beach*, a charter city satisfies the MMBA's procedural requirements when it  
27 meets and confers with employee organizations before making a decision to place a matter on the  
28 ballot. Relying on *Seal Beach*, the Court of Appeal in *United Public Employees v. City and*

1 *County of San Francisco*, 190 Cal. App. 3d 419 (1987), specifically held that the MMBA is not  
2 violated when a city charter requires that changes in certain terms and conditions of employment  
3 be enacted by the voters.

4 Based on these authorities, the SJPOA cannot state a “substantive” claim for violation of  
5 the MMBA, but only a procedural claim – that the City of San Jose failed to adequately meet and  
6 confer before placing Measure B on the ballot. The City in fact did meet and confer with the  
7 SJPOA and other employee organizations. However, the exclusive remedy for claim of failure to  
8 meet and confer before placing a measure on the ballot is an action brought in *quo warranto*,  
9 which requires the permission of the Attorney General. *International Assn. of Fire Fighters v.*  
10 *City of Oakland*, 174 Cal. App. 3d 687 (1985).

11 This is not a *quo warranto* action, and although the SJPOA filed an application with the  
12 Attorney General for permission to file a *quo warranto* action, the Attorney General has not  
13 granted the application. Significantly, to bolster its application to the Attorney General, the  
14 SJPOA asserted that the instant case involves only a “substantive” MMBA claim – which as  
15 demonstrated below does not exist. The SJPOA further asserted that the only remedy for a  
16 “procedural” violation of the MMBA is a *quo warranto* action – expressly admitting that it could  
17 not bring such a procedural claim as part of this action.

18 Based on the above legal principles, this Court should grant judgment on the pleadings,  
19 and dismiss with prejudice, the SJPOA’s Seventh Cause of Action for a “substantive and  
20 procedural” violation of the MMBA.

## 21 **II. STATEMENT OF FACTS**

### 22 **A. Measure B.**

23 On June 5, 2012, San Jose city voters enacted Measure B, an amendment to the San Jose  
24 City Charter entitled: “The Sustainable Retirement Benefits and Compensation Act.” (Request  
25 for Judicial Notice, Exh. A.) The “Findings” for the Act state that the City’s ability to provide its  
26 citizens with “Essential City Services” – such as police and fire protection, street maintenance  
27 and libraries – is threatened by rising costs for city employee retirement benefits. (Section  
28 1501-A.) The stated “Intent” of the Act is to “ensure the City can provide reasonable and

1 sustainable post-employment benefits while at the same time delivering Essential City  
2 Services.” (Section 1502-A.)<sup>1</sup>

3 **B. The SJPOA’s Complaint.**

4 The SJPOA filed its Complaint For Declaratory and Injunctive Relief on June 6, 2012, the  
5 day after the June 5 election. The Complaint includes a Seventh Cause of Action for “Violation of  
6 MMBA, Gov. Code § 3512 *et. seq.*” The SJPOA complaint is one of five state court challenges to  
7 Measure B which this Court consolidated for pretrial purposes. Only the SJPOA brings a claim  
8 for violation of the MMBA.

9 The SJPOA’s Seventh Cause of Action for violation of the MMBA places at issue two  
10 provisions of Measure B: Sections 1506-A (Current Employees), and 1512-A (a) (Retiree  
11 Healthcare – Minimum Contributions).

12 **Section 1506-A.** Section 1506-A provides that unless Current Employees opt-in to an  
13 alternative, lower cost retirement plan (called the Voluntary Election Program or “VEP”), they  
14 “shall have their compensation adjusted through additional retirement contributions in increments  
15 of 4% of pensionable pay per year, up to a maximum of 16%, but no more than 50% of the costs  
16 to amortize any pension unfunded liabilities ....” If the VEP “has not been implemented for any  
17 reason, the compensation adjustments shall apply to all Current Employees.” (RJN, Exh. A)

18 Plaintiff SJPOA’s Seventh Cause of Action alleges that: “Section 1506-A of Measure B  
19 violates the MMBA both substantively and procedurally because it directs that the City shall  
20 unilaterally reduce salaries by as much as 16% if the VEP is ‘illegal, invalid or unenforceable as to  
21 Current Employees,’ without requiring the City to bargain over such reductions and/or even if  
22 bargaining were to take place it makes the amount of salary reductions non-negotiable.” (SJPOA  
23 Compl., ¶ 105.)

24 <sup>1</sup> Measure B includes provisions that require employees to pay increased pension contributions  
25 towards system unfunded liabilities, authorize an alternative lower cost pension plan, provide a  
26 “Tier 2” pension plan for new employees, confirms the Municipal Code requirement that  
27 employees to pay equally towards retiree healthcare, modify the basis for disability retirements,  
28 grant the City Council authority to suspend COLA payments in the event of an emergency,  
discontinue the supplemental retiree benefit reserve, and require retirement plans to be actuarially  
sound, among others. (RJN, Exh. A)

1       **Section 1512-A.** Section 1512-A requires: “Existing and new employees must contribute  
2 a minimum of 50% of the cost of retiree healthcare, including both normal cost and unfunded  
3 liabilities.” (RJN, Exh. A)

4       The Seventh Cause of Action alleges: “Section 1512-A violates the MMBA both  
5 substantively and procedurally because it unilaterally effects an increase in employee  
6 contributions for retiree healthcare benefits, and consequently, reduces net salaries. It also violates  
7 the MMBA because it effectively eliminates the SJPOA’s ability to bargain with the City over  
8 retiree healthcare benefits, when such benefits are a mandatory subject of bargaining under the  
9 MMBA.” (SJPOA Compl., ¶ 106.)

10       The SJPOA, however, does not claim that the City has violated the SJPOA’s current  
11 memorandum of agreement with the City. Consistent with the Municipal Code, the MOA already  
12 requires SJPOA members to cost share with the City for retiree healthcare benefits.

13       **C.     The SJPOA’s Application To File A Quo Warranto Action.**

14       In June 2012, the SJPOA filed an application with the California Attorney General for  
15 leave to file a *quo warranto* action to invalidate Measure B based on the City’s failure to  
16 adequately meet and confer before placing Measure B on the ballot.<sup>2</sup> (RJN, Exhs. B-E.) The  
17 Proposed Verified Complaint includes a claim that: “The Defendants Violated The Meyers-  
18 Milias-Brown Act, Government Code 3500 *et. seq.*, by Deciding To Place Measure B Before the  
19 Voters Without First Providing the SJPOA With Notice and an Opportunity to Bargain.”  
20 (Verified Complaint at p. 6). The Verified Complaint asks for a judgment declaring Measure B  
21 “null and void and of no legal effect ....” (*Id.*, Exh. D at p. 15.) On September 28, 2012, the  
22 SJPOA sent a letter to the Attorney General’s Office asserting that the instant Superior Court  
23 action “does not and cannot (for the reasons stated *supra*) attack the procedural validity” of  
24 Measure B and therefore “does not address and cannot redress the violations of the Meyers-Milias-

25 \_\_\_\_\_  
26 <sup>2</sup> The SJPOA filed a Notice of Application For Leave To Sue In *Quo Warranto*, an Application  
27 For Leave To Sue in *Quo Warranto*, a Proposed Verified Complaint, a Verified Statement of Facts  
28 In Support of the Application, and a Memorandum of Points and Authorities. The City has not  
attached the Verified Statement of Facts as an Exhibit to the Request For Judicial Notice due to its  
volume.

1 Brown Act ('MMBA') (Gov. Code 3500 *et. seq.*) at issue in the SJPOA's proposed *quo warranto*  
2 action." (RJN, Exh. F)

3 **III. ARGUMENT**

4 A defendant may bring a motion for judgment on the pleadings on the same grounds as a  
5 general demurrer, but the motion may be made after the time for filing the demurrer has expired.  
6 Code of Civil Procedure § 438(c); *Stoops v. Abbassi*, 100 Cal. App. 4th 644, 650 (2002). The  
7 grounds for a motion for judgment on the pleadings must appear on the face of the challenged  
8 pleading or, in the alternative, may be based on facts which the Court may judicially notice. Code  
9 of Civil Procedure § 438(d). The City brings this motion under Code of Civil Procedure §  
10 438(c)(1)(B)(ii) because the SJPOA's Seventh Cause of Action "does not state facts sufficient to  
11 constitute a cause of action" against the City.

12 **A. Plaintiff Cannot State A Substantive Claim Under The MMBA**

13 The SJPOA Complaint alleges that Measure B violates the MMBA "both substantively and  
14 procedurally." However, the MMBA does not contain substantive requirements. Plaintiff's only  
15 potential cause of action is for a violation of the MMBA's procedural requirements: that the City  
16 failed to engage in adequate meet and confer before placing Measure B on the ballot. As  
17 established below, this assertion – which is not supported by the facts – can only be litigated in a  
18 *quo warranto* action, not here.

19 **1. *The MMBA Does Not Contain Substantive Requirements.***

20 Public sector collective bargaining statutes, like the MMBA, contain only procedural  
21 requirements. Therefore, the SJPOA cannot bring a cause of action under the MMBA for  
22 violation of its "substantive" requirements.

23 The Legislature enacted the MMBA to "provid[e] a reasonable method of resolving  
24 disputes regarding wages, hours, and other terms and conditions of employment between public  
25 employers and public employee organizations." Gov. Code § 3500, subd. (a). To this end, the  
26 MMBA requires public employers to "meet and confer in good faith" with recognized employee  
27 organizations on matters within the "scope of representation," including "wages, hours and other  
28 terms and conditions of employment." Gov. Code §§ 3504, 3505. Where the parties are able to

1 reach agreement, they prepare a “memorandum of understanding” which must be adopted by the  
2 public agency’s governing body in order to be binding. Gov. Code § 3505.1. If no agreement is  
3 reached, however, the governmental body has the authority to implement its last best and final  
4 offer. Gov. Code § 3505.7; *Seal Beach Police Officers’ Assn. v. City of Seal Beach, supra*, 36  
5 Cal. 3d 591, 601 (1984); *County of Sonoma v. Superior Court*, 173 Cal. App. 4<sup>th</sup> 322, 329 (2009).

6 Although the MMBA establishes a procedure by which wages, hours, and other terms and  
7 conditions of employment are to be set – it does not establish any substantive standards for  
8 conditions of employment. *Seal Beach Police Officers’ Assn., supra*, 36 Cal. 3d at 597 [“While  
9 the Legislature [in enacting the MMBA] established a procedure for resolving disputes regarding  
10 wages, hours and other conditions of employment, it did not attempt to establish standards for the  
11 wages, hours and other terms and conditions themselves.”]; *County of Riverside v. Superior*  
12 *Court*, 30 Cal. 4<sup>th</sup> 278, 289 (2003) (quotations omitted) [“We have ‘emphasize[d] that there is a  
13 clear distinction between the substance of a public employee labor issue and the procedure by  
14 which it is resolved.”]

15 Based on these authorities, the SJPOA cannot state a claim for a substantive violation of  
16 the MMBA. The MMBA contains only procedural, not substantive requirements.

17 **2. Under The MMBA, The City’s Only Obligation Before Placing Measure**  
18 **B On The Ballot Was Procedural – To Meet And Confer With The**  
**SJPOA.**

19 The SJPOA complains that Measure B provisions that establish increased employee  
20 contributions towards pensions (Section 1506-A) and increased employee contributions towards  
21 retiree healthcare (Section 1512-A) violate the MMBA because SJPOA will not have the  
22 opportunity to bargain over these issues in the future. But Supreme Court and Court of Appeal  
23 decisions establish that (1) under the California Constitution, charter cities have authority to set  
24 terms and conditions of employment though Charter provisions established by the voters, and (2)  
25 under the MMBA, a charter city’s only obligation, before placing such a measure on the ballot, is  
26 to meet and confer with affected employee organizations.

27 ///

28 ///

1                                   **(a) Under the California Constitution, the compensation of charter**  
2                                   **city employees is a matter of local concern.**

3                   Under the California Constitution, the compensation of charter city employees is a  
4 municipal function that is a matter of local and not statewide concern. Cal. Const.Art. XI, §  
5 5(b)(4); *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296,  
6 317 (1979) ["salaries of local employees of a charter city constitute municipal affairs and are not  
7 subject to general laws"]; accord *State Building and Construction Trades Council of California,*  
8 *AFL-CIO v. City of Vista*, 54 Cal. 4<sup>th</sup> 547 (2012) ["the salaries of charter city employees are a  
9 municipal affair and not a statewide concern"]; see, also, *County of Riverside v. Superior Court,*  
10 *supra*, 30 Cal. 4<sup>th</sup> at 286-291 [imposition of binding interest arbitration by state legislature violated  
11 county's authority to "provide for the ... compensation ... of employees" under Cal. Const., art.  
12 XI, § 1(b)]. Under the "Home Rule" provisions of the state Constitution: "The governing body or  
13 charter commission of a county or city may propose a charter or revision. Amendment or repeal  
14 may be proposed by initiative or by the governing body." Cal. Const. art. XI, § 3(b).

15                                   **(b) The MMBA is compatible with voter authority over city charter**  
16                                   **provisions establishing terms and conditions of employment.**

17                   The requirements of the MMBA are compatible with a charter city's authority to establish  
18 terms and conditions of employment in its city charter. The MMBA itself states: "Nothing  
19 contained herein shall be deemed to supersede the provisions of existing ... charters ... that  
20 establish and regulate a merit or civil service system or which provide for other methods of  
21 administering employer-employee relations...." Gov. Code § 3500.

22                   In *City and County of San Francisco v. Cooper*, 13 Cal. 3d 898 (1975), the California  
23 Supreme Court rejected a contention that the MMBA meet and confer process was incompatible  
24 with charter-required prevailing wage standards. The Court explained: "This, of course, does not  
25 mean that the meet and confer process may supplant the charter's prevailing wage guidelines; the  
26 [MMBA] itself recognizes the continued validity of such charter provisions." *Id.* at p. 922.

27                   Consistent with the decision in *Cooper*, in *Seal Beach*, the California Supreme Court found  
28 no conflict "between the city council's power to propose charter amendments and section 3505 [of  
the MMBA]." *Seal Beach Police Officers' Assn. v. City of Seal Beach, supra*, 36 Cal. 3d at p.

1 601. The Supreme Court explained: "Although that section [of the MMBA] encourages binding  
2 agreements resulting from the parties' bargaining, the governing body of the agency – here the city  
3 council – retains the ultimate power to refuse an agreement and to make its own decision. This  
4 power preserves the council's rights under [California Constitution] article XI, section 3,  
5 subdivision (b) – it may still propose a charter amendment if the meet and confer process does not  
6 persuade it otherwise." *Id.* at p. 601 [citations omitted]. Accordingly, the Court rejected the  
7 City's contention that the meet and confer requirement interfered with the City's authority to  
8 propose a charter amendment concerning employee discipline. After meeting and conferring, the  
9 City was entitled to place the measure on the ballot. *Id.* at p. 600-601.

10 Subsequently, in *Building Material & Construction Teamsters' Union v. Farrell*, 41 Cal.  
11 3d 651 (1986), the Court reiterated that the MMBA was compatible with city charter provisions  
12 that govern terms and conditions of employment – in that case a city charter provision granting the  
13 City Civil Service Commission the authority to reclassify positions. The Court explained:

14 "It is well settled that statutes should be construed in harmony with other  
15 statutes on the same general subject. [citations] . . . The same rule of  
16 construction applies to a potential conflict between a statute and a charter  
17 provision. The relevant section of the [Charter] clearly gives the civil  
18 service commission the authority to 'reclassify' and 'reallocate'  
19 employment positions in city government. It is far from clear, however,  
20 that this power conflicts with the meet and confer provisions of the  
MMBA. First, although the MMBA mandates bargaining about certain  
matters, public agencies retain the ultimate power to refuse to agree on  
any particular issue. [citation] Thus the power to reclassify employment  
positions is not necessarily inconsistent with the requirement to meet with  
employee representatives and confer about reclassifications before the  
changes are implemented." *Id.* at p. 665.

21 In finding the City Charter and the MMBA to be compatible, *Farrell* confirmed the  
22 Supreme Court's decision in *Seal Beach*, stating: "We held that although the California  
23 Constitution (art. XI, §3, subd. (b)) clearly gives cities the right to propose charter amendments,  
24 this right is compatible with the mandate to meet and confer before proposing amendments  
25 concerning the terms and conditions of public employment." *Id.* at p. 666. Subsequently, in *City*  
26 *and County of San Francisco v. United Assn. of Journeymen*, 42 Cal. 3d 810, 816, n. 5 (1986), the  
27 Court reiterated: "City employees are subject to the [provisions of the MMBA], but only to the  
28 extent that its provisions are not inconsistent with the [Charter]."

1 Under these California Supreme Court decisions, the voters of a charter city retain the  
2 constitutional authority to adopt a charter amendment that affects the terms and conditions of  
3 employment. That authority is subject only to the procedural requirement that the city first meet  
4 and confer with affected employee organizations. Therefore, before placing Measure B on the  
5 ballot, the City of San Jose's only obligation was to meet and confer with the SJPOA (which it  
6 did).

7 (c) **The requirement that changes to charter enacted wages and**  
8 **benefits be submitted to the voters is not inconsistent with the**  
9 **MMBA.**

10 The SJPOA contends that Measure B is invalid under the MMBA because it places certain  
11 wage and benefit requirements in the San Jose City Charter, thus removing them from future  
12 bargaining without return to the voters. A similar contention was rejected in *United Public*  
13 *Employees v. City and County of San Francisco*, 190 Cal. App. 3d 419 (1987). In *United Public*  
14 *Employees*, the City had informed city unions that the city charter required it to submit any  
15 agreement on fringe benefits to the voters for approval. *Id.* at p. 421. According to the Court:  
16 "The sole issue is whether the MMBA's 'meet and confer' process is incompatible with the power  
17 of the electorate in a charter city to 'reserve the right to either grant or deny' benefits of public  
18 employment." *Id.* at p. 422.

19 Relying on *Seal Beach*, the Court in *United Public Employees* held that nothing in the  
20 MMBA prevented the San Francisco City Charter from requiring "voter approval of any 'addition,  
21 deletion or modification' of city employee benefits." *Id.* at p. 423. The Court explained: "We  
22 agree that the election requirement encumbers the bargaining process and may be a much more  
23 expensive adjunct to meet-and-confer negotiations than a simple submission to the board of  
24 supervisors. However, the electorate has declined to grant the board this authority, and we do not  
25 rule on the wisdom of charter provisions, that matter being entrusted to the voters." *Id.* at p. 425.  
26 The Court found that the MMBA's objective to "promote full communication between public  
27 employers and their employees" is "served by requiring the public employer to meet and confer  
28 with employee representatives before proposing a charter amendment which, as here, concerns the  
terms and conditions of public employment." *Id.* at p. 425.

1 A subsequent Supreme Court decision highlights the special status of charter cities under  
2 the California Constitution. In *Voters for Responsible Retirement v. Board of Supervisors of*  
3 *Trinity County*, 8 Cal. 4<sup>th</sup> 765 (1994), the Court examined the authority of the voters in a *general*  
4 *law county* to approve or reject a memorandum of understanding with county employees by  
5 referendum. The Court based its decision on Government Code section 25123(e), which lists  
6 memoranda of understanding between *counties* and employee organizations as a class of  
7 ordinances “specifically required by law to take effect immediately” under Elections Code §  
8 3751(a)(2) and thus not subject to referendum. 8 Cal. 4<sup>th</sup> at pp. 776-778. The Court held that this  
9 exception was justified to advance the MMBA’s purpose of promoting collective bargaining  
10 agreements. *Id.* at pp. 781-784.

11 In deciding *Trinity County*, the Supreme Court said nothing to contradict its prior holdings  
12 in *Cooper, Farrell and Seal Beach*, which unlike *Trinity County*, addressed the powers of charter  
13 cities. Rather, the Court was careful to distinguish charter cities and their special status under the  
14 California Constitution. The Court commented that *United Public Employees* “understated the  
15 problematic nature of the relationship between the MMBA and the local referendum power.” *Id.*  
16 at p. 782. But the Court specifically stated that it was *not deciding* whether “the restriction of the  
17 referendum power for ordinances adopting or implementing MOU’s applies to cities” or “to a  
18 consolidated city and county such as San Francisco.” The Court pointed out that Government  
19 Code section 25123(e), upon which it relied for its decision, “is applicable to counties only and  
20 has no counterpart for cities.” *Id.* at pp. 782, nn. 4, 5.

21 Unlike *Trinity County*, this case does not involve a county, or a referendum over an already  
22 approved memorandum of understanding. Rather, this case involves a charter city and a charter  
23 amendment enacted by city voters that frames future discussions. By expressly limiting its  
24 holding to counties, *Trinity County* highlights the continued viability of Supreme Court opinions  
25 holding that, under the California Constitution’s grant of plenary authority to charter cities, the  
26 voters of charter cities may establish terms and conditions of employment in city charters. All  
27 over California, city charters have established wage formulas, pension and other retirement  
28 benefits, interest arbitration to resolve disputes, and many other terms and conditions of

1 employment. To hold that city charters may no longer regulate these topics, because submission  
2 of changes to the voters violates the MMBA, would upend decades of judicial authority and  
3 established practice.

4 In summary, by enacting Measure B, the voters added requirements for increased payments  
5 by employees to the City Charter. Contrary to the SJPOA's contention, there is no conflict  
6 between the MMBA's meet and confer requirement and voter authority over these terms and  
7 conditions of employment. Under the California Constitution, and the Supreme Court opinions in  
8 *Cooper, Farrell, and Seal Beach*, the voters have the authority to establish terms and conditions of  
9 employment in a city charter. Under these Supreme Court opinions, the MMBA is satisfied by the  
10 process of meet and confer before proposals are considered by the voters.

11 B. **Plaintiff SJPOA's Seventh Cause of Action Must Be Dismissed Because A**  
12 **Claim For Violation Of The MMBA In Placing A Measure On The Ballot Can**  
**Be Brought Only In A Quo Warranto Action**

13 Plaintiff SJPOA's Seventh Cause Of Action must be dismissed because the sole remedy  
14 for an alleged failure to meet and confer over a ballot measure is to file a *quo warranto* action,  
15 which requires the permission of the Attorney General. In fact, the SJPOA has filed a separate  
16 "Verified Complaint In *Quo Warranto*" with the Attorney General, but the Attorney General has  
17 not given the SJPOA permission to sue.

18 The *quo warranto* complaint procedure is described in Code of Civil Procedure § 803,  
19 which states, in relevant part:

20 "An action may be brought by the attorney-general, in the name of the people of  
21 this state, upon his [or her] own information, or upon a complaint of a private party,  
22 against any party who usurps, intrudes into, or unlawfully holds or exercises any  
23 public office, civil or military, or any franchise, or against any corporation, either  
*de jure* or *de facto*, which usurps, intrudes into, or unlawfully holds or exercises  
any franchise, within this state."

24 For a private party to file a *quo warranto* action, it must first obtain leave from the  
25 Attorney General. See, California Code of Regulations, Title 11, § 2 ("the proposed defendant  
26 may, within the period provided in Section 3 hereof, show cause, if any he have, why 'leave to  
27 sue' should not be granted in accordance with the application therefor.")  
28

1        *Quo warranto* is the exclusive legal mechanism for attacking the legitimacy of a City  
2 Charter amendment allegedly placed on the ballot in violation of the MMBA. *International Assn.*  
3 *of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d 693-698 (1985). *See Cooper v. Leslie Salt*  
4 *Co.*, 70 Cal. 2d 627, 633 (1969) (“absent constitutional or statutory regulations providing  
5 otherwise, *quo warranto* is the only proper remedy in cases in which it is available”); *Oakland*  
6 *Municipal Improvement League v. City of Oakland*, 23 Cal. App. 3d 165, 169 (1972) (“Appellants  
7 do not contend that a *quo warranto* proceeding would not be available, nor could they do so. ... It  
8 follows that such a proceeding is exclusive.”)

9        In *International Association of Fire Fighters v. City of Oakland*, 174 Cal. App. 3d at p.  
10 689-690, employee unions, retirees and taxpayers claimed that two City Charter measures, which  
11 negatively affected retirement benefits, were invalid because the City had failed to adequately  
12 meet and confer before placing them on the ballot. The Court of Appeal held that “an action in the  
13 nature of *quo warranto* constitutes the exclusive method for appellants to mount their attack on the  
14 charter amendments based on the city’s failure to comply with the Meyers-Milias-Brown Act.” *Id*  
15 at p. 690.

16        Recently, in Attorney General Opinion No. 11-702, the Attorney General considered a  
17 request by a City of Bakersfield employee union for leave to bring a *quo warranto* action against  
18 the City based on the City’s alleged failure to meet and confer before placing a pension related  
19 measure on the ballot. The measure not only established a new pension benefit formula and  
20 contribution levels, it also provided that the new formula and contribution levels could only be  
21 amended or repealed by a vote of the electorate. 95 Ops. Cal. Atty. Gen. 31 (2012).

22        The Attorney General did not reach the merits, concluding “only that a *quo warranto*  
23 action is the appropriate legal proceeding in which to resolve this issue.” *Id.* at p. 13. The  
24 Attorney General relied on *International Association of Fire Fighters*, noting that in *Fire Fighters*,  
25 “the Court of Appeal held that *quo warranto* is the *only* legal mechanism for attacking the  
26 legitimacy of a charter-amending initiative alleged to have been placed on the ballot in violation of  
27 the MMBA.” *Id.* at p. 6 [emphasis in original]. In rendering a decision, the Attorney General  
28 specifically acknowledged that “because the new rules may not be changed or repealed except by

1 a vote of the City's electorate, Measure D effectively removes the subject of pension benefit  
2 calculation formulas and member contribution levels from future bargaining discussions." *Id.* at p.  
3 7. The Attorney General opinion did not cite this factor as any reason to depart from the  
4 established rule that *quo warranto* is the exclusive remedy.

5 Under *Association of Fire Fighters*, the SJPOA's claim that the City has violated the  
6 MMBA procedures must be brought by obtaining leave to file a *quo warranto* action, which is the  
7 exclusive method to challenge a Charter measure placed on the ballot in alleged violation of the  
8 MMBA. As expressly acknowledged in the Attorney General opinion, the fact that the Charter  
9 amendment removes a topic from future bargaining over a memorandum of understanding does  
10 not change the rule that *quo warranto* is the exclusive remedy.

11 Obviously, this is not a *quo warranto* action and therefore the SFPOA's claim for a  
12 procedural violation of MMBA must be dismissed.

13 **C. SJPOA'S Pending Application With The Attorney General For Leave To File**  
14 **A Quo Warranto Action Admits That Quo Warranto Is The Sole Legal Avenue**  
**For Its MMBA Procedural Claim.**

15 The SJPOA filed an application for leave to bring a *quo warranto* action which admits that  
16 the only avenue for its procedural MMBA claim is a *quo warranto* action -- and not this action.

17 In June 2012, the SJPOA filed an application with the California Attorney General for  
18 leave to file a *quo warranto* action to invalidate Measure B based on the City's failure to  
19 adequately meet and confer before placing Measure B on the ballot. (RJN, Exhs. B-E) That  
20 application is pending.<sup>3</sup> Recently, the SJPOA responded to an inquiry by the Attorney General's  
21 Office requesting information "pertaining to six other legal actions regarding the recently-passed  
22 'Measure B' in the City of San Jose" -- which include this action. (RJN, Exh. F)

23 ///

24 <sup>3</sup> The City opposed the application because the SJPOA could not show a disputed issue of fact or  
25 law in light of the City's exhaustive pre-election meet and confer efforts and because a *quo*  
26 *warranto* action would not serve the public interest. The City informed the Attorney General that  
27 the SJPOA and other unions had brought other challenges to Measure B -- including this action --  
28 seeking to invalidate Measure B on a myriad of grounds not limited to the MMBA. The City  
pointed out that if any of these actions were successful in invalidating Measure B, they would  
achieve the same relief sought in the *quo warranto* complaint.

1 In its response, the SJPOA first admitted – citing *International Assoc. of Fire Fighters* –  
2 that a *quo warranto* proceeding is the exclusive avenue to attack a municipal charter provision  
3 placed on the ballot in violation of the MMBA’s procedural meet and confer requirements. (*Id.* at  
4 p. 1.) The SJPOA then asserted that that the instant action – Santa Clara Superior Court Case No.  
5 1-12-CV-225926 – was no substitute for a *quo warranto* action because it was brought only to  
6 challenge the “substantive legality” of certain provisions of Measure B and “does not and cannot  
7 (for the reasons stated supra) attack the procedural validity of Measure B.” *Id.* at p. 2.

8 The SJPOA’s response demonstrates why its Seventh Cause of Action fails to state a  
9 claim. First, the SJPOA asserted that this action contains only a substantive MMBA challenge to  
10 Measure B. As demonstrated above, there is no legal claim for a substantive violation of the  
11 MMBA. Second, the SJPOA admitted that any procedural MMBA challenge must be brought  
12 through a *quo warranto* action – not this action. Therefore, the SJPOA’s Seventh Cause of Action  
13 for “substantive and procedural” violations of the MMBA must be dismissed with prejudice.

#### 14 **IV. CONCLUSION**

15 The SJPOA fails to state a claim for “substantive” or “procedural” violations of the  
16 MMBA. The MMBA does not contain any “substantive” requirements. Its requirements are  
17 purely procedural. In this case, under the MMBA, the City was required only to meet and confer  
18 before proposing Measure B to the voters (which the City did). But a *quo warranto* action –  
19 which requires the approval of the Attorney General – is the sole remedy for a failure to meet and  
20 confer over a proposed charter amendment. The SJPOA applied for leave to file a separate *quo*

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

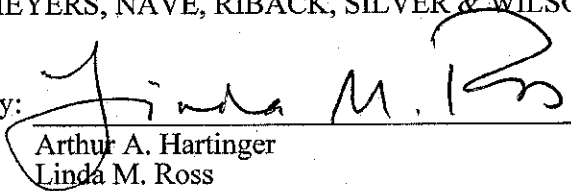
28 ///

1 *warranto* action and admitted, as part of that application, that *quo warranto* is the sole avenue for  
2 remedying a procedural violation of the MMBA. Therefore, this Court should grant judgment on  
3 the pleadings, with prejudice, on the SJPOA's Seventh Cause of Action for violation of the  
4 MMBA.

5  
6 DATED: November 28, 2012

MEYERS, NAVE, RIBACK, SILVER & WILSON

7  
8 By:

  
Arthur A. Hartinger  
Linda M. Ross  
Jennifer L. Nock  
Michael C. Hughes  
Attorneys for Defendant  
City of San Jose

9  
10  
11  
12 2007182.1  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28